

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of:

**Request for Postponement or
Waiver of Payments Due the
Commission**

PP Docket No. 93-253

TO: The Commission

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PETITION FOR SPECIAL AND EXTRAORDINARY RELIEF

Total Interaction, Inc. (hereinafter referred to as "TII"), pursuant to Section 1.2104(I) of the Commission's Rules, requests special and extraordinary relief from the revised Installment Plan Schedule dated December 20, 1995. TII also requests a postponement or total waiver of any and all payments of principal and interest due for spectrum purchased at the Interactive Video and Data Service (hereinafter referred to as "IVDS") auction that was held on July 28 and 29, 1994 in Washington, DC (hereinafter referred to as the "Auction").

Events that occurred prior to, during and immediately following the Auction, and which continue to occur to this day, have prevented the development of any identifiable business for the IVDS industry and have damaged, irreparably harmed and will continue to irreparably harm TII and all other winning IVDS bidders (hereinafter referred to as the "Licensees"). To stem the continuing devaluation of the Licensees' substantial investment, the Commission must act fairly, equitably and quickly to grant the relief prayed for herein. Your Petitioner is without an adequate remedy at law.

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1. On December 7, 1987, TV Answer, Inc., which now does business as Eon Corp., filed a Petition for Rule-Making with the Commission requesting the allocation of radio spectrum to operate an interactive video and data service.

2. On February 13, 1992, the Commission adopted rules authorizing the allocation of spectrum for use by the proponents of IVDS. In the process, the Commission allocated one megahertz of spectrum at 218-219 MHz and defined 734 service areas, with each service area containing two licenses (each one for a 500 kilohertz channel). Prior to allocating the spectrum, however, the Commission did not require that fully operational commercial trials be conducted by TV Answer or any of the other proponents of the frequency allocation. Accordingly, no fully (or even partially) operational IVDS system was ever put into operation to test and demonstrate the capabilities, commercial viability, equipment availability and public acceptance of the proposed frequency use and to establish uniform technical standards. Yet these fundamental business tenets were certainly observed by the Commission when evaluating the propriety of allocating frequency to the proponents of, among others, the cellular, paging, and PCS industries.

3. In September, 1993, the first 18 licenses for the nine (9) largest IVDS markets were awarded by the Commission through a lottery process. While it may be stating the obvious, as a result of being awarded their IVDS licenses through the lottery process, these lottery licensees do not have any obligations to make payments to the Commission, even though they possess IVDS licenses in the nine largest markets in the United States. Significantly, these lottery licensees, have made no greater progress than auction licensees in attracting investors and building IVDS systems. This stark reality underscores

the fundamental problems all licensees are having with system development throughout the entire IVDS industry.

4. Thereafter, on August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 authorized the FCC to use auctions to choose among mutually exclusive applications for initial licenses in certain radio services. Thereafter, the Commission ruled the IVDS spectrum as being available only through an auction.

5. On July 28 and 29, 1994, the FCC held its first, and only, auction of IVDS licenses, auctioning a total of 594 licenses for the IVDS Metropolitan Service Areas (hereinafter "MSAs"). To participate in the Auction, potential licensees simply needed to submit a certified check in the amount of \$2,500.00 to the Commission for every five (5) licenses they anticipated acquiring. The Commission, however, conducted no due diligence regarding the ability of the potential licensees to make even the initial 10% down payments that were required by the Commission's own Auction rules.

6. During the Auction, TII submitted the high bids for the Phoenix, AZ (MSA 26, Segment B), Memphis, TN (MSA 36, Segment B), Orlando, FL (MSA 60, Segment A) and Clarksville-Hopkinsville, TN-KY (MSA 209, Segment A) IVDS markets. TII bid a total of \$4,775,000 during the auction. At the time of making its high bids, TII believed that a proven, uniform and commercially viable IVDS system would be immediately available for it to purchase from one or more equipment vendors. Moreover, prior to the auction, TII was cognizant of the Commission's requirement that IVDS service needed to be made "available" to 10% of the population in its four (4) licensed areas within one year of the Commission's award of licenses to TII.

7. Within the time frames required by the FCC's bidding rules, TII made its two initial 10% payments to the FCC totalling \$955,000.00.

8. Following the July 28 and 29, 1994 auction, numerous high bidders failed to make any payments whatsoever to the FCC. By itself, the negative impact of these defaults has cast a continuing pall over the entire IVDS industry. Moreover, it has frightened potential investors and created an almost impossible environment for small, entrepreneurial business to gain a foothold. To date, the Commission has taken no steps to re-auction the defaulted licenses or to auction the remaining Rural Service Areas (hereinafter referred to as "RSAs"). Such uncertainty on the Commission's behalf has only served to exacerbate the underlying problems in the industry. Is the Commission fearful that a re-auction of defaulted MSA licenses will result in substantially lower prices being paid? Your Petitioner contends that this is the single most important reason why no new IVDS auction has been scheduled. Moreover, if the prices of the re-auctioned IVDS license are as low as the Commission fears, all Licensees from the initial auction will be demanding refunds, or at the very least, substantial reductions in their financial obligations to the Commission. In short, the results of the re-auction would cause panic in an already unstable IVDS industry.

Significantly, when the Commission issued competitive bidding rules for the upper 10 MHz block of Specialized Mobile Radio ("SMR") spectrum, it corrected - or at least attempted to correct - the fatal errors that occurred during the IVDS Auction. Specifically, applicants will apply for the upper 10 MHz block auction by filing a short-form application, indicating the markets and spectrum blocks for which they seek to apply, and paying an upfront payment. The standard upfront payment formula is \$0.02 per activity unit, based on the particular spectrum blocks in each service area identified in the applicants' short-form application and the total service area population. The Commission defines "activity unit" as the number of megahertz of spectrum, multiplied by the

population of the relevant license area, or "pops." Most importantly, the Commission adopted the Milgrom-Wilson activity rule by which bidders are required to declare their maximum eligibility in terms of activity units and are limited to bidding on licenses encompassing no more than the activity units covered by their upfront payments, and uses a simultaneous stopping rule. Had these two new rules been in effect during the IVDS Auction, substantially different results would have been achieved.

9. To make matters worse, prior to and immediately following the July 28 and 29, 1994 auction, Eon Corp., RTT, Interactive Return Service, Welcome to the Future and other equipment manufacturers touted their respective systems and each company projected ever changing system acquisition and implementation costs, equipment delivery dates, applications and the infinite commercial potential of the IVDS industry. As of this date, however, over 30 months after the award of the initial 18 IVDS licenses by lottery and over 20 months after the IVDS auction, there are simply no commercially viable IVDS systems in operation. Most importantly, even after making extensive investments of time and money in their efforts, Licensees simply cannot identify what service they can or will provide through their spectrum. And even if a particular service or application could be identified, the lack of information on the availability, cost and delivery schedule for a system's hardware/software make it impossible to determine if paying customers can be attracted to the system and if the business can be operated profitably.

10. As recently as March 15, 1996, at an FCC sponsored Conference on Auctions at the Grand Hyatt Hotel in Washington, DC, more disconcerting news was transmitted to Licensees. In short, the speakers at the Conference expressed divergent views on the future possibilities of the IVDS industry. Thomas MacLeod, the Vice President of Corporate Business

Development at the Eon Corporation stated that Eon envisions only one commercially viable use for the IVDS spectrum: two-way paging. Similarly, Elliott Hamilton, the Vice President and Director of North American Telecommunications at MTA-EMCI, a wireless telecommunications consulting firm, also projects that the IVDS spectrum will only be able to compete for paying customers in the two-way paging marketplace.

The problems with this scenario are two-fold. First, and foremost, while Eon filed a Petition for Rule-Making regarding two-way paging and mobility in May, 1994, the Commission has yet to issue its ruling. Furthermore, Eric Malinen, the Commission's representative on IVDS at the Conference, clearly indicated that the Commission would not be issuing a ruling for at least the next "few months." If Eon's business projection is accurate, an unfavorable ruling would "drive the final nail in the IVDS industry's coffin." It is illogical to require continued payments for IVDS licenses that will only have value if the Commission rules favorably on a Petition that was filed almost two years ago.

Second, and more troubling from a business perspective, if mobility is the future of the IVDS industry, how are the small, poorly funded IVDS Licensees expected to compete with the telecommunication giants for a share of the limited, but growing, two-way paging market. Broadband PCS and little LEO systems will be able to offer similar services at prices below IVDS.

11. Notwithstanding the fact that several companies claim to be developing hardware and software applications specifically designed for IVDS Licensees, equity requires that Licensees not be required to continue paying for licenses that are presently unusable and have no clearly identifiable use on the near or distant horizon.

12. Licensees are being economically punished for a situation that is completely out of their control. Some Licensees were attracted to the

IVDS auction by simple advertisements placed in the *Wall Street Journal* by the Commission. Others, like TII, had extensively researched the potential of the IVDS industry and had determined that if the hardware and software could be acquired and installed quickly and efficiently, then ownership of IVDS licenses could be a profitable business opportunity. TII also relied heavily on the fact that the Commission had presumably spent the better part of five (5) years testing and evaluating the potential of IVDS prior to allocating spectrum for its commercial exploitation. Also, because TV Answer/Eon's system had been type-accepted by the Commission prior to the auction, and after a number of face to face meetings with TV Answer/Eon, TII assumed that their equipment and service was available for immediate purchase, installation and exploitation. Nothing, however, could have been further from the truth.

Prior to the auctions, TV Answer/Eon failed to advise TII, or any of its potential customers, that its numerous strategic alliances had evaporated while waiting for the Commission to allocate spectrum for IVDS. TV Answer/Eon also failed to provide customers with price lists that could be relied upon to create any semblance of a business plan for the operation of an IVDS business.

13. The Commission promoted and sold licenses to the general public which were falsely hyped at the time of sale, by Eon, other hardware vendors, the Commission itself and others, and which remain commercially unusable to this date. It is completely unconscionable for the U.S. government to require its citizens - many of whom who are small, minority or female-owned businesses - to continue paying for IVDS licenses that currently have no commercial value.

14. As of this date, your Petitioner and many other bona fide IVDS purchasers have paid at least twenty percent (20%) of the total bid amount to the Commission and have expended substantial additional sums to keep their

business running, including extensive fees for legal, engineering, and consulting services. Substantial additional expenses are always on the horizon. Fortunately, there is no commercially viable IVDS equipment to purchase. This expense would be more than most Licensees could afford to incur. (With limited funds and little hardware and software to choose from, most Licensees will only have one opportunity to choose the proper equipment for their system.) Choosing the wrong system, based on an incorrect judgment of the future of the industry, will also be fatal. Again, given the uncertainty of the future of the IVDS industry, it is impossible to make any enlightened equipment decisions.

15. It is simply impossible for IVDS Licensees to attract investors to the industry without there being a sense of stability as a result of the existence of a clear and well-defined business opportunity. Even the most adventurous venture capital players have avoided participating in the IVDS industry. Accordingly, if the IVDS Licensees do not have the ability to raise capital, they will not have the ability to build IVDS systems. Shortly thereafter, the IVDS industry will cease to exist.

WHEREFORE, considering the foregoing facts, TII requests that the Commission immediately take the following positive action:

1. Issue an Order directing that all payments to the Commission be indefinitely suspended and postponed until 180 days following the realization of the following events:

a. The Commission modifies, or elects to not modify, the rules restricting duty cycle, frequency use and mobility, cooperation among and between licensees in the same market, and cooperation among and between an IVDS licensee and a Channel 13 license holder;

b. At least two (2) hardware vendors with FCC type-accepted equipment have developed at least two (2) software applications that have been tested and have a commercial application that can be exploited on a commercial basis;

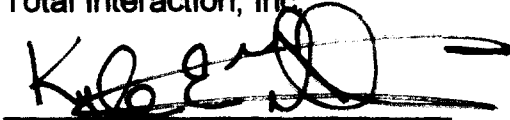
c. At least two (2) hardware vendors with FCC type-accepted equipment are in a position to make their equipment available to all Licensees in commercially acceptable quantities; and

d. All remaining IVDS licenses - both the RSAs and defaulted MSAs - have been auctioned.

2. Issue an Order to all Licensees who have paid a minimum of 20% of their bid price allowing them to cancel the IVDS license(s) purchased at the July 28 and 29, 1994 auction, request a refund of all funds paid to the Commission and to permit the return of the licenses to the Commission.

Respectfully submitted,

Total Interaction, Inc.

A handwritten signature in black ink, appearing to read "Kyle E. Gillman", is written over a horizontal line.

Kyle E. Gillman, President

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